



Technological University Dublin  
**ARROW@TU Dublin**

---

Reports

Law

---

2016-05-31

## The jurisdiction of the Irish Courts in the protection of the constitutional rights of a person accused of a crime.

Adrian Berski

*Technological University Dublin, [adrian.berski@mydit.ie](mailto:adrian.berski@mydit.ie)*

Follow this and additional works at: <https://arrow.tudublin.ie/aaschlawrep>



Part of the [Constitutional Law Commons](#), [Criminal Law Commons](#), and the [Criminal Procedure Commons](#)

---

### Recommended Citation

Berski, A. (2016) The jurisdiction of the Irish Courts in the protection of the constitutional rights of a person accused of a crime.. Report prepared for School of Languages, Law and Social Sciences, Technological University Dublin, 2016.

This Report is brought to you for free and open access by the Law at ARROW@TU Dublin. It has been accepted for inclusion in Reports by an authorized administrator of ARROW@TU Dublin. For more information, please contact [yvonne.desmond@tudublin.ie](mailto:yvonne.desmond@tudublin.ie), [arrow.admin@tudublin.ie](mailto:arrow.admin@tudublin.ie), [brian.widdis@tudublin.ie](mailto:brian.widdis@tudublin.ie).



This work is licensed under a [Creative Commons Attribution-Noncommercial-Share Alike 3.0 License](#)



***The jurisdiction of the Irish Courts in the protection of the constitutional rights of a person accused of a crime.***

**Table of contents**

<b>Situation analysis and introductory remarks.....</b>	<b>1</b>
<b>1. The jurisdiction of the Irish Courts in the protection of the constitutional rights of a person accused of a crime. ....</b>	<b>2</b>
<b>2. The functioning of criminal justice system in the protection of the general Society`s interest.....</b>	<b>4</b>
<b>3. Possible remedies and interpretation of results. ....</b>	<b>6</b>
<b>List of sources.....</b>	<b>7</b>



## **Situation analysis and introductory remarks.**

Studying the Irish Constitutional Law, requires the understanding of how the Irish Political System was evolved. Montesquieu's tripartite system, adopted by the Republic of Ireland is the judiciary<sup>1</sup> has a particular place in the Irish Constitution in articles 34 - 37<sup>2</sup>.

The main purpose of this essay is to analyse the balance between the jurisdiction of the Irish Courts in the protection of the constitutional rights of a person accused of a crime and the functioning of the criminal justice system in protecting Society's general interest. The first section presents a brief summary of the courts functions and the Irish judicial system. The author tries to exam some particular Court's judgments which are related to the protection individual's rights during their criminal trial or accusation. The author takes into account, in particular, articles 38.1 and 40.4.2 of the Constitution<sup>3</sup>.

The functioning of the criminal justice system in the protection of Society's general interests is the second part of the thesis. Again, the author analyses decisions made by Judges, regarding the limitation of constitutional rights. The aim of this part is to show how individual rights can be limited or suspended in particular circumstances, especially those of public order. Most examples are based on prison law and criminal law.

The third and final part of the essay includes possible remedies and the interpretation of results. Here, the author tries to find proper answers for the question: do Irish courts maintain a "delicate and important balance" between the rights of a person accused of a crime and the protection of Society's general interests. This part includes possible remedies in Constitutional Law, which can be used by the courts.

In this thesis, the author has been using research methods identified within the law sciences. Institutional and legal methods were used to interpret acts, constitutional law, and case law. The elements of the decision making methods are acknowledged in chapter two, especially in the analyses process of the Court's decision. For the possible remedies and the interpretation of results, the author used the sociological method by conducting an analyses of the law in real action – as a social fact.

---

<sup>1</sup> Ch. Montesquieu, *The Spirit of the Laws*, v. I, Warsaw 1957, p. 244.

<sup>2</sup> *Bunreacht na hÉireann* (Enacted by the People 1st July, 1937), [online:]

[[http://www.taoiseach.gov.ie/eng/Historical\\_Information/The\\_Constitution/February\\_2015\\_-\\_Constitution\\_of\\_Ireland\\_.pdf](http://www.taoiseach.gov.ie/eng/Historical_Information/The_Constitution/February_2015_-_Constitution_of_Ireland_.pdf)], acc. 20.02.2016.

<sup>3</sup> Ibidem.

## **1. The jurisdiction of the Irish Courts in the protection of the constitutional rights of a person accused of a crime.**

Articles 34 – 37 of the Irish Constitution, refer to the functioning of the courts in the Republic of Ireland. Article 34.1 defines the judicial role<sup>4</sup>:

Justice shall be administered in Courts established by law by judges appointed in the manner provided by this Constitution, and, save in such special and limited cases as may be prescribed by law, shall be administered in public.

Based on the above piece of law, it can be stated that the role of the judiciary is assigned to apply to the law-judgments in the settlement of disputes between the parties remaining in dispute. It decides on the vested rights and performs other activities stipulated by the laws or international agreements. In other words, the role of the judges is determined by the guilt of a person and the relevant sentence.

One of the most significant Irish cases, which makes clear the core characteristic of the judicial function is *McDonald v Bord na gCon*<sup>5</sup>. In this case, Mr Justice Kenny described five indicia of the judicial power<sup>6</sup>:

“1. A dispute or controversy as to existence of legal rights or a violation of the law

2. The determination or ascertainment of the rights of parties or the imposition of liabilities or the infliction of a penalty

3. The final determination (subject to appeal) of legal rights or liabilities or the imposition of penalties

4. The enforcement of those rights or liabilities or the imposition of a penalty by the Court or by the executive power of the State which is called by the Court to enforce its judgment

5. The making of an order by the Court which as a matter of history is an order characteristic of Courts in this country”.

These five characteristics are regularly used in the sentencing process<sup>7</sup>. However, it is important to stress that articles 34.1 – 37.1 of the Irish Constitution provide common

---

<sup>4</sup> Ibidem.

<sup>5</sup> *McDonald v Bord na gCon* [1965] IR 217.

<sup>6</sup> J. Macken, E. Galligan, M. McGrath, *Compulsory Purchase and Compensation in Ireland: Law and Practice*, Dublin 2013, p. 73.

restrictions in transferring judicial power to different institutions. On the other hand, the provision provides some transfer of judicial power in every matter other than criminal law<sup>8</sup>.

In conclusion, within the perspective of the courts functions and the Irish judicial system, it is worth mentioning that apart from Bunreacht na hÉireann, the Courts jurisdiction are also regulated by the Courts (Establishment and Constitution) Act 1961<sup>9</sup> and the Courts Service Act 1998<sup>10</sup>.

As already mentioned, the main role of the Court is to judge the guilt of a person and to provide the relevant sentence. One of the areas where, in particular, the courts decisions are related to the protection of individual's rights is within the area of criminal law, especially bail queries<sup>11</sup>. The conditions of bail are determined by the Bail Act 1997<sup>12</sup> and the Sixteenth Amendment of the Constitution of Ireland<sup>13</sup>. One significant example, where the court protected the constitutional rights of a person accused of a crime, is *People v O'Callaghan* case<sup>14</sup>. In this case, Mr Justice Walsh explained that<sup>15</sup>:

Bail cannot be refused merely because there is the likelihood of the commission of further offences while on bail, as that is a form of preventive justice unknown to our legal system and contrary to the true purpose of bail.

Regarding this, the Constitutional rights for presumption of innocence of Mr O'Callaghan was protected. Article 38.1 of the Irish Constitution was used in the judgment, which stated that: "No person shall be tried on any criminal charge save in due course of law"<sup>16</sup>. This fundamental right has been used by Judges up to now in criminal trials or bail cases. Another similar judgment took place in the *Ryan v DPP* case<sup>17</sup>. These two cases have a very strong impact for protecting the constitutional rights of a person accused of a crime. The impact is especially based on a presumption of innocence rule.

Another example, where the Irish constitutional Law strongly pertains to criminal justice is *DPP v Carmody* case<sup>18</sup>. Again, Constitutional rights were protected, and Mr

---

<sup>7</sup> *Keady v Commissioner of an Garda Síochána* [1992] 2 IR 197.

<sup>8</sup> This example could be observe in *Goodman v Hamilton* [1992] 2 IR 542.

<sup>9</sup> *Courts (Establishment and Constitution) Act 1961*, [online:] [<http://www.irishstatutebook.ie/eli/1961/act/38/enacted/en/html>], acc. 20.12.2015.

<sup>10</sup> *Courts Service Act 1998*, [online:] [<http://www.irishstatutebook.ie/eli/1998/act/8/enacted/en/html>], acc. 25.2.2016.

<sup>11</sup> A. Berski, *Determinants of the Irish bail system before and after 1997*, [online:] [<http://arrow.dit.ie/aaschlawrep/3/>], acc. 26.2.2016.

<sup>12</sup> *Bail Act 1997*, [online:] [<http://www.irishstatutebook.ie/eli/1997/act/16/enacted/en/html>], acc. 24.12.2015.

<sup>13</sup> *Bunreacht na hÉireann*.

<sup>14</sup> *People v O'Callaghan*, [1966] IR 501.

<sup>15</sup> *Ibidem*.

<sup>16</sup> *Bunreacht na hÉireann*.

<sup>17</sup> *Gordon Ryan v DPP*, [1989] IR 399.

<sup>18</sup> *People (DPP) v Carmody* [1988] ILRM 370.

Justice McCarthy granted bail. In this judgment the element of the Constitutional law, regarding the “preventive detention” is evident. The institution of the preventive detention is not available in the Irish State<sup>19</sup>.

The symbolic example of the relation between Irish constitutional law and criminal trials, can also be found in the Martin McDonagh and Patrick McDonagh vs The Governor of Cloverhill Prison case<sup>20</sup>. In this case, both brother`s constitutional rights were breached as they were not informed about the new evidence of their bail application. This extraordinary example shows how article 40.4.2 (Habeas Corpus order) of the Irish Constitution protected the rights of a person accused of a crime<sup>21</sup>. The fundamental rights to Messrs McDonaghs` personal liberty was upheld by the Supreme Court. A similar judgment can be observed in Galvin v Governor of Cloverhill Prison case<sup>22</sup>.

## **2. The functioning of criminal justice system in the protection of the general Society`s interest.**

The essential objective of the criminal justice system is to prevent and deter crime<sup>23</sup>. According to the above assertion, some of the rights which are guaranteed by the Constitution could be restricted. In the State (McDonagh) v Fawley (1978) case, it is evident that some constitutional privileges can be limited:<sup>24</sup>

[...] while so held as a prisoner pursuant to a lawful warrant, many of the applicant`s normal constitutional rights are abrogated or suspended. He must accept prison discipline and accommodate himself to the reasonable organisation of prison life laid down in the prison regulations [...]

Similarly, in Holland v Governor of Portlaoise Prison<sup>25</sup>, “breaches” of fundamental Constitutional rights for freedom of expression guaranteed by article 40.6.1 of the Constitution are evident<sup>26</sup>. Justice MacKechnie said that: “the only rights suspended are

---

<sup>19</sup> “An Act to make better provision for the prevention of crime, and for that purpose to provide for the reformation of Young Offenders and the prolonged detention of Habitual Criminals, and for other purposes incidental thereto”, *Prevention of Crime Act 1908*, [online:] [<http://www.irishstatutebook.ie/1908/en/act/pub/0059/print.html>], acc. 20.10.2014.

<sup>20</sup> *McDonagh v Governor of Cloverhill Prison* [2005] IESC 4, [S.C. Nos. 12 and 13 of 2005].

<sup>21</sup> *Bunreacht na hÉireann*.

<sup>22</sup> *Galvin v Gubernator Cloverhill Prison* [2012] IEHC 497.

<sup>23</sup> R. Byrne, P. McCutcheon, *The Irish Legal System*, Dublin 2009, p. 1-59.

<sup>24</sup> *The State (McDonagh) v Fawley* [1978] IR 131.

<sup>25</sup> *Holland v Governor of Portlaoise Prison* [2004] 2 IR 573.

<sup>26</sup> *Bunreacht na hÉireann*.

those which necessarily follow from imprisonment security requirements". This statement should be compared with the main aim of the prison system, which is: "The mission of the Irish Prison Service is: Providing safe and secure custody, dignity of care and rehabilitation to prisoners for safer communities"<sup>27</sup>. From this, it is objectively and publicly understandable, that in order to protect society's general interests, some constitutional rights could be limited.

Connolly v Governor of Wheatfield Prison case shows that Constitutional rights in some circumstances can be violated<sup>28</sup>:

The obligation to treat all with dignity appropriate to the human condition is not dispensed with simply because those who claim that the essence of their human dignity has been compromised happen to be prisoners.

The Constitution commits the State to the protection of these standards since it presupposes the existence of a civilised and humane society, committed to democracy and the rule of law and the safeguarding of fundamental rights.

This means that fundamental rights are not absolute and can be limited by the court within extraordinary circumstances. It is worth highlighting the judgment in Kearney v Minister for Justice<sup>29</sup>.

Not only the prison law can determine to restrict constitutional rights. Bail application after 1997 generate bail conditions more draconian<sup>30</sup>. The impact of the above can be found in refuse bail application and thus in some cases the restriction of fundamental rights guaranteed in the Constitution. The article 40.4.6 (the Sixteenth Amendment of the Constitution in 1996) gives power to the High Court to quash bail application<sup>31</sup>:

Provision may be made by law for the refusal of bail by a court to a person charged with a serious offence where it is reasonably considered necessary to prevent the commission of a serious offence by that person.

In other words, it means that the High Court can limit habeas corpus rights in order to protect Irish society. The sentence "it is reasonably considered necessary" is left for Judges to interpret personally.

---

<sup>27</sup> *The Irish Prison Service Annual Report 2012*, [online:] [<http://www.irishprisons.ie/images/pdf/annualreport2012web.pdf>], acc. 23.04.2015.

<sup>28</sup> *Connolly v Governor of Wheatfield Prison* [2013] IEHC 334.

<sup>29</sup> *Kearney v Minister for Justice* [1986] IR 116.

<sup>30</sup> A. Berski, *Determinants of the Irish bail system before and after 1997*, [online:] [<http://arrow.dit.ie/aaschlawrep/3/>], acc. 26.2.2016.

<sup>31</sup> *Bunreacht na hÉireann*.



Another example which shows that personal constitutional rights are not absolute and are subject to limitation is the fundamental case *Ryan v Attorney General*<sup>32</sup>. Mr Keeny stated that: “None of the personal rights of the citizen are unlimited: their exercise may be regulated by the Oireachtas when the common good requires this”. Again, in this instance, the common good-or society`s general interests plays a significant role in the decision.

It is important to understand that constitutional rights are subject to unquestionable limitation during imprisonment. This is evident in the *Murray v Ireland* case<sup>33</sup> where a married couple claimed under article 41 of the Irish Constitution<sup>34</sup>. Mr. Justice Costello held that the couple have legal rights to have children, however, the prison environment doesn't offer proper facility for that purpose. Based on that, constitutional rights can be limited for the purpose of prison security-safety and the common good-or society`s general interests.

### **3. Possible remedies and interpretation of results.**

It is difficult to find and assess the balance between “protecting society’s overall interest in allowing the criminal justice system to effectively detect and punish criminal activity against protecting the constitutional rights of a person accused of a crime”.

In the analysis undertaken in section one of cases where the constitutional rights of individuals were protected, those cases were especially expressed through the Bail Application Process, Article 40.4.2 of the Irish Constitution (Habeas Corpus order) and the Presumption of Innocence Rule<sup>35</sup>. The latter is additionally regulated by the European Convention on Human Rights in Article 6(2): “Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law”<sup>36</sup>. This precedent can be found in *DPP v. D O'T* case<sup>37</sup>.

---

<sup>32</sup> *Ryan v Attorney General* [1965] IR 294.

<sup>33</sup> *Murray v Ireland* [1985] 1 IR 532; [1991] ILRM 465.

<sup>34</sup> *Bunreacht na hÉireann*.

<sup>35</sup> *Ibidem*.

<sup>36</sup> *European Convention on Human Rights*, [online:] [[http://www.echr.coe.int/Documents/Convention\\_ENG.pdf](http://www.echr.coe.int/Documents/Convention_ENG.pdf)], acc. 26.01.2015.

<sup>37</sup> *Director of Public Prosecutions v. D. O'T*, [2003] 4 IR 286.

Regrettably, there are a limited volume of cases where the constitutional rights of individuals are fully protected. More likely they are limited or violated. In section two, many of the examples indicate that the constitutional rights are not fully extinguished, but temporary limited – for the common good. This situation can be justified – for the protection of society.

Additionally, it is worth noting the case *People (A.G.) v O'Brien*<sup>38</sup>. In this case, the constitutional rights of Mr O'Brien were violated under Article 40.5 of the Constitution because the evidence was obtained unconstitutionally. However, there were “extraordinary circumstances excusing the violation” in order to admit the evidence. In *The People (A.G.) v O'Brien* case is an exceptional example of how the Irish Courts maintain a balance between the protection of individual's rights and protecting society. However, on the other hand, in *DPP v Kenny* case, the court excluded all evidence obtained in an unconstitutional way (Exclusionary Rule)<sup>39</sup>.

In order to achieve a correct balance in court decisions, it is important to take into account all the evidence and do conduct proper analyses. This will help to achieve a “delicate and important” balance from both the State's and the individual's perspective. On the other hand, crimes statistics should play a significant role in some decisions, especially for bail cases. For instance, in 2013, The High Court analysed 1710 bail applications. 461 instances were granted, where a person out on bail committed 22,416 crimes<sup>40</sup>. Because of this, some constitutional rights (for example for habeas corpus or presumption of innocence) could be limited in order to avoid crimes, and build the proper prevention tools.

## List of sources.

### 1) LEGISLATION (Primary sources of law)

- Constitution of Ireland (In operation as from 29th December, 1937).
- Bail Act 1997.

---

<sup>38</sup> *People (A.G.) v O'Brien* [1965] IR 142.

<sup>39</sup> *People (DPP) v Kenny* [1990] 2 IR 110.

<sup>40</sup> The Journal, *Nine murders committed by people released on bail*, 12th of February 2013, [online:] [<http://www.thejournal.ie/offences-bail-2012-791444-Feb2013/>], acc. 21.10.2014.

- Courts Service Act 1998.
- Prevention of Crime Act 1908.
- Prisons Act 2007.
- European Convention on Human Rights 1950.

## 2) COMMON LAW (Primary sources of law)

- Connolly v Governor of Wheatfield Prison [2013] IEHC 334.
- Director of Public Prosecutions v. D. O'T, [2003] 4 IR 286.
- Galvin v Gubernator Cloverhill Prison [2012] IEHC 497.
- Goodman v Hamilton [1992] 2 IR 542.
- Gordon Ryan v DPP, [1989] IR 399.
- Holland v Governor of Portlaoise Prison [2004] 2 IR 573.
- Kearney v Minister for Justice [1986] IR 116.
- Keady v Commissioner of an Garda Síochána [1992] 2 IR 197.
- McDonald v Bord na gCon [1965] IR 217.
- McDonagh v Governor of Cloverhill Prison [2005] IESC 4, [S.C. Nos. 12 and 13 of 2005].
- Murray v Ireland [1985] 1 IR 532; [1991] ILRM 465.
- People (DPP) v Carmody [1988] ILRM 370.
- People (DPP) v Kenny [1990] 2 IR 110.
- People v O'Callaghan, [1966] IR 501.
- People (A.G.) v O'Brien [1965] I.R. 142
- The State (McDonagh) v Frawley [1978] IR 131.
- The State (Richardson) v Governor of Mountjoy Prison [1980] ILRM 82.

### 3) DOCUMENTS AND REPORTS (Secondary sources of law).

- European Court of Human Rights, URL: <[http://www.echr.coe.int/Documents/Court\\_in\\_brief\\_POL.pdf](http://www.echr.coe.int/Documents/Court_in_brief_POL.pdf)>.
- Irish Prison Service, URL: <<http://www.irishprisons.ie/index.php/regimes-directorate/77-untitled/118>>.
- The Irish Prison Service Annual Report 2012, URL: <<http://www.irishprisons.ie/images/pdf/annualreport2012web.pdf>>.

- The Journal, Nine murders committed by people released on bail, 12th of February 2013, URL: <<http://www.thejournal.ie/offences-bail-2012-791444-Feb2013/>>.

#### 4) ARTICLES, MONOGRAPHS, STUDIES.

- Berski A., Determinants of the Irish bail system before and after 1997, URL: <<http://arrow.dit.ie/aaschlawrep/3/>>.
- Byrne R., McCutcheon P., The Irish Legal System, Dublin 2009.
- Doyle O., Constitutional Law: Text, Cases and Materials, Dublin 2008.
- Hogan G, Whyte G, JM Kelly: The Irish Constitution, Dublin 2003.
- Macken J., Galligan E., McGrath M., Compulsory Purchase and Compensation in Ireland: Law and Practice, Dublin 2013.
- Montesquieu Ch., The Spirit of the Laws, v. I, Warsaw 1957.
- Murdoch H., Murdoch's dictionary of Irish Law, Dublin 2004.
- Schweppes J., How to Think Write and Cite – key skills for Irish Law, Dublin 2011.